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9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**
11 **SOUTHERN DIVISION**

12 VINCENT ZINNI, on behalf of himself
13 and those similarly situated,

14 Plaintiff,

15 v.

16 CLICKSOFTWARE TECHNOLOGIES
17 LTD., ISRAEL BOROVICH, MOSHE
18 BENBASSAT, SHAI BEILIS, NIRA
19 DROR, SHLOMO NASS, MENAHEM
20 SHALGI, GIL WEISER, FRANCISCO
21 PARTNERS LP, OPTIMIZER TOPCO
22 S.A.R.L., and OPTIMIZER MERGER
23 HOLDINGS LTD.,

24 Defendants.

Case No. 8:15-cv-00863-JLS-JCG

25 **SUPPLEMENTAL MEMORANDUM**
26 **OF POINTS AND AUTHORITIES IN**
27 **FURTHER SUPPORT OF**
28 **PLAINTIFF'S MOTION FOR**
VOLUNTARY DISMISSAL

Date: May 13, 2016

Time: 2:30 PM

Place: Courtroom 10A

29 **I. INTRODUCTION**

30 Pursuant to this Court's Order of April 19, 2016, requesting a supplemental
31 brief to be filed no later than Friday, May 6, 2016, in connection with Plaintiff's
32 Motion for Voluntary Dismissal (the "Order"), Plaintiff submits this memorandum
33 of law identifying "decisions wherein a court approved the payment of attorneys'

fees by defendant to plaintiff's counsel where there was a voluntary dismissal of class claims without prejudice, a voluntary dismissal with prejudice of plaintiff's individual claims, and plaintiff obtained no recovery." Order, at 1.

Plaintiff seeks reimbursement of attorneys' fees and expenses for his mooted claims and Defendants do not oppose the reimbursement of modest attorneys' fees and costs to Faruqi & Faruqi, LLP in the amount of \$67,500.00 and to Brodsky & Smith, LLC in the amount of \$67,500.00.

II. DECISIONS MEETING THE COURT'S FOUR REQUIREMENTS

The Order requests that Plaintiff identify decisions¹ that meet four requirements:

- 1) wherein a court approved the payment of attorneys' fees by defendant to plaintiff's counsel;
- 2) where there was a voluntary dismissal of class claims without prejudice;
- 3) a voluntary dismissal with prejudice of plaintiff's individual claims;
- 4) and plaintiff obtained no recovery.²

Plaintiff has identified one California decision and three Delaware decisions meeting these requirements (the "Four Requirements") all of which were within the past 15 months. These decisions are discussed below.

¹ In the context of awards of mootness fees in M&A litigation, the court dockets usually end with the plaintiff filing a motion to dismiss for mootness with an agreed upon amount of attorneys' fees, a reference to the supplemental disclosure which was the result of plaintiff's litigation efforts, and a court order. For the sake of brevity, these various filings combined are referred to herein as decisions.

² In the Delaware decisions, plaintiffs obtained no monetary recovery, but did obtain supplemental disclosures. In the California action, there was a price bump post-complaint but defendants denied the price bump had anything to do with plaintiffs' litigation. Defendants conceded, however, that the cause of the supplemental disclosures in that action, described *infra*, was "[i]n connection with certain litigation."

1 **A. California Decision**

2 In *In re Integrated Silicon Solution, Inc. Stockholder Litig.*, (“ISS”), Lead
 3 Case No. 115CV278815 (Santa Clara, CA Sept. 24, 2015) (Hon. Peter H. Kirwan),
 4 the Order states that the “action is dismissed with prejudice as to Plaintiffs” and the
 5 action is “dismissed as to the class without prejudice” thus meeting requirements 2
 6 and 3 above. *See* Order Granting Plaintiffs’ Request For Dismissal and Request for
 7 Dismissal, at 2 (the “ISS Order”), a true and correct copy of which is attached to the
 8 Declaration of Evan J. Smith in Further Support of Plaintiff’s Motion for Voluntary
 9 Dismissal (hereinafter “Smith Decl.”) at Exhibit A.³ The Declaration of David E.
 10 Bower in Support of Plaintiffs’ Request For Dismissal, dated Sept. 18, 2015, in the
 11 same action shows, at ¶ 27, that the ISS Order awarded an agreed upon sum of
 12 \$1,500,000 to Plaintiffs’ counsel for fees and expenses (thus meeting Requirement
 13 1). *Id.* As to Requirement 4 (no recovery), there was a price bump post-complaint
 14 but defendants denied the price bump had anything to do with the litigation.
 15 Defendants conceded, however, that the cause of the supplemental disclosures in
 16 that action was “[i]n connection with certain litigation.” *See* the ISS Supplemental
 17 Disclosures, filed as Amendment No. 3 to the Schedule 14A, on June 17, 2015. *Id.*

18 **B. Delaware Decisions**

19 Identified below are three decisions from the Delaware Court of Chancery that
 20 meet each of the Four Requirements. All the decisions were decided within
 21 approximately the last year. Mootness attorneys’ fees awarded for supplemental
 22 disclosures range from \$450,000 to \$750,000.

23 1. *In re DFC Global Corp. Shareholders Litig.*, Consolidated, C.A. No.
 24 9520-CB (Del. Ch. March 27, 2015) pursuant to the “Granted Stipulation and
 25 [Proposed] Order Closing Case” dated, March 27, 2015 (the “DCF Order”), the
 26 action was dismissed “with prejudice only to plaintiffs individually and without

27 ³ Exhibits referred to in this Supplemental Memorandum are attached to the Declaration of Evan
 28 J. Smith in Further Support of Plaintiff’s Motion for Voluntary Dismissal, filed
 contemporaneously herewith.

1 prejudice [to the class]” meeting Requirements 2 and 3. A true and correct copy of
2 this granted Stipulation and Order is attached to the Smith Decl. at Exhibit B. The
3 Notice to Stockholders referenced in the *DCF* Order shows fees of \$750,000 were
4 awarded and refers to supplemental disclosures filed with the SEC on May 28, 2014,
5 but no price bump or other monetary benefit was obtained. *Id.* Thus, all Four
6 Requirements were met.

7 2. *In re Office Depot, Inc. Stockholders Litig.*, Consolidated, C.A. No.
8 10655-CB, the “Granted Stipulation and Order Regarding Dismissal of the Above-
9 Captioned Action with Exhibit A,” dated Nov. 2, 2015, (the “*Office Depot* Order”),
10 awarded attorneys’ fees and shows the supplemental disclosures that were made. A
11 true and correct copy of which is attached to the Smith Decl. at Exhibit C. The
12 “Granted with Modifications Stipulation and Order Regarding Payment of
13 Attorney’s Fees and Expenses,” dated Oct. 27, 2015, shows that the amount of fees
14 awarded was \$500,000. *Id.* The *Office Depot* Order shows supplemental disclosures
15 were filed with the SEC and also refers to the court “dismissing the action *with*
16 *prejudice only as to plaintiffs.*” (Emphasis added). *Id.* Thus, all of the Four
Requirements were met.

17 3. Mootness attorneys’ fees of \$450,000 were awarded in *Cohen v.*
18 *Malone* [Liberty Broadband], C.A. No. 11416-VCG, pursuant to an order entitled
19 “Granted Stipulation of Dismissal,” dated January 25, 2016 and another order
20 entitled “Granted Stipulation and Order Regarding Notice of Dismissal,” dated
21 January 11, 2016. A true and correct copy of which is attached to the Smith Decl.
22 at Exhibit D. Although brought as a class action, the order states that plaintiffs were
23 “dismissing the action with prejudice only as to plaintiffs.” *Id.* Supplemental
24 disclosures were contained in a September 11, 2015 Proxy Statement. Thus, all Four
25 Requirements were met.

1 **III. CONCLUSION**

2 For all of the foregoing reasons, Plaintiff respectfully requests the Court
3 dismiss the action with prejudice as to the Plaintiff and without prejudice as to the
4 class, and enter the proposed Order.

5 DATED: May 5, 2016

Respectfully submitted,

6 **BRODSKY & SMITH, LLC**

7
8 By: /s/ Evan J. Smith

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